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MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1977

No. 77-457

EXXON PIPELINE COMPANY,
Petitioner,

v.

UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION,
Respondents.

**SUPPLEMENT TO PETITION FOR
WRIT OF CERTIORARI**

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Petitioner, Exxon Pipeline Company (Exxon), hereby submits to the Court the attached Supplement to its previous filings in this proceeding.¹ The Supplement is a copy of an Order of the Interstate Commerce Commission issued September 27, 1977, in ICC Investigation and Suspension Docket No. 9164, *et al.*, the ICC proceeding which is at issue in petitioner's filings before this Court. The Commission's September 27 Order, in brief, denies

¹ On September 22, 1977, petitioner Exxon filed with this Court three documents: (1) Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit; (2) Application for Stay of Mandate of United States Court of Appeals for the Fifth Circuit And Stay of Order of the Interstate Commerce Commission; and (3) Motion to Accelerate Consideration. The attached Supplement is pertinent to all three documents.

various petitions for reconsideration and other requests for affirmative relief filed by respondents and protestants in response to the Commission's June 28 Order. Three dissenting Commissioners would have, *inter alia*, granted respondents an increase of 42 cents per barrel in the Commission's prescribed interim rates. (Supplement, p. 7).

Reference was made to Exxon's Petition for Reconsideration and Supplement thereto pending before the ICC in petitioner's Petition for Writ of Certiorari (p. 18 n. 10). The effect of the Commission's September 27 Order, denying Exxon's and other parties' petitions for reconsideration, is to remove any remaining uncertainty about the irreparable losses which Exxon and the other owners of TAPS will suffer if this Court does not grant the relief sought. The estimates of those losses and other factual information presented in petitioner's filings are unaffected by the Commission's September 27 Order.

Respectfully submitted,

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INTERSTATE COMMERCE COMMISSION

ORDER

INVESTIGATION AND SUSPENSION DOCKET NO. 9164¹

TRANS ALASKA PIPELINE SYSTEM (Rate Filings)

[Service Date Sep. 27, 1977]

By orders of June 28, 1977,² and July 19, 1977,³ we instituted investigations into the lawfulness of initial tariff rates filed by eight pipeline companies for transportation of crude petroleum over the Trans Alaska Pipeline System. We also suspended the operation of those rates for periods of seven months and authorized the filing of lower interim rates for use during the suspension period. Petitions for reconsideration of various aspects of our orders have been filed both by the pipeline companies and by parties challenging their tariffs.⁴

On petition, one or more of the carriers contend: (1) that higher interim rates should be authorized on the basis that traffic volume during the suspension period

¹ Embraces Investigation and Suspension Docket No. 9164 (Sub-No. 1), Trans Alaska Pipeline System (Rate Filings); Docket No. 36611, Trans Alaska Pipeline System (Rules and Regulations); and Docket No. 36611 (Sub-No. 1), Trans Alaska Pipeline System (Rules and Regulations).

² I. & S. No. 9164, affecting Amerada Hess Pipeline Corporation, Arco Pipe Line Company, BP Pipelines, Inc., Exxon Pipeline Company, Mobil Alaska Pipeline Corporation, Sohio Pipe Line Company, and Union Alaska Pipeline Company.

³ I. & S. No. 9164 (Sub-No. 1), affecting Phillips Alaska Pipeline Corporation.

⁴ The petitions and replies to them are identified in the appendix to this order.

will average less than the 1.2 million barrels a day assumed in the Commission's orders; (2) that the yearly charges recognized for removal and restoration costs should be increased to account for inflation and taxes; (3) that a greater percentage return on valuation should be allowed; and (4) that the suspension periods for Phillips and Amerada Hess should be modified. These contentions will be discussed individually.

In our order of June 28th, we assumed that the carriers' normal traffic volume, or "throughput," for the beginning years would be 1.2 million barrels a day. We used this assumption in converting the carriers' total costs to per-barrel costs, for the purpose of finding suitable interim per-barrel rates. The carriers now seek a decrease in the assumed throughput, which would result in higher costs per barrel, and thus, higher interim rates.

The carriers do not deny that 1.2 million barrels is the amount that they reported to the Commission as their expected normal daily throughput (prior to any future expansion of pipeline capacity). However, they now take the position that, in authorizing an interim rate for a seven-month suspension period, the Commission should consider only the traffic volume expected during that period. They note that throughput during the suspension period will be lower than normal volume for two reasons: (1) there is an expected lower-volume startup period, variously estimated to last from several weeks to as long as four months, and (2) the occurrence of a fire at Pump Station 8 has imposed a substantial additional delay on the attainment of normal traffic volume.

We find insufficient basis in the petitions for modifying the throughput assumption upon which the interim rates were computed. At the time of our previous orders, we were indeed aware that there would be a startup period in which throughput would be below normal. Neverthe-

less, we did not consider it suitable to use the throughput level of a short initial period, such as the suspension period, as the basis for finding per-barrel costs. The interim rates were intended to be preliminary estimates of maximum lawful rates for the services proposed in the tariff. Therefore, the cost data and the throughput assumption that we used were related to expected typical conditions of pipeline operation. The petitions show no reason to conclude that the throughput figure used was erroneous on the basis of the data previously before the Commission.

Nor do we believe that the carriers' assertion of changed circumstances resulting from the pump station fire warrants a modification of the throughput assumption. The carriers contend that this accident will have a severe and rather long-lasting effect on throughput. In some of the petitions, it is estimated that throughput will not exceed 800,000 barrels a day during the suspension period, and may be much less. Phillips and Exxon report an estimate that daily volume will range from 617,000 barrels in August 1977 to 690,000 barrels in December 1977; Phillips further asserts that the 690,000 barrel level may not be exceeded until the third quarter of 1978.

There are two reasons why these assertions do not warrant a change in our throughput assumption. First, the risk of setbacks such as the pump station fire was taken into account when we chose the rate of return on valuation to be allowed in computing interim rates. Second, the carriers have provided no data and little explanation to support their projections of lower throughput. We do not know, for example, how much daily throughput capacity was lost specifically from the destruction of pump station 8; when pump station 8 is expected to be restored to service; why this amount of time would be required; what other factors enter into the carriers' throughput estimates; what means other than the rebuilding of pump station 8

are available to increase the throughput; whether such means will be employed, and to what effect.

In short, our prior orders were made in recognition both of an expected initial period of low throughput and of the risk of operating problems. The information subsequently submitted by the carriers is insufficient to establish circumstances very different from what we previously contemplated. Therefore, the request for use of a different throughput assumption in computing authorized interim rates will be denied.

Turning to the carriers' other contentions, the question of the appropriate allowance for removal costs was fully considered in our previous orders, as was the question of the appropriate rate of return standard for use at the suspension level. No warrant for modification of those conclusions has been demonstrated.

Amerada Hess and Phillips each seek modification of the termination dates of their suspension periods, which are later than the termination dates for the other six carriers. The tariff of Amerada Hess had a proposed effective date one day later than the others. Its tariff, like the others, was suspended for a period of seven calendar months. However, as a result of the differing lengths of the included calendar months, its suspension period extends two days beyond the others. It seeks to have its suspension period shortened by one day, to have the same number of days' duration as the others.

Phillips' tariff was filed with an effective date 20 days later than the others, and therefore its suspension period expires 20 days later. It seeks to have its suspension period shortened to expire on the same day as the others.

These requests for shortened suspension periods will be denied. The statutory seven-month suspension period was established by Congress for the protection of the public. Under present circumstances, we do not believe that the

public should be deprived of that protection by the use of a shorter suspension period than the law allows. As an incidental matter, we note that, in the June 28th order, the omission of the words "and including" from the description of the last day of the suspension period for Amerada Hess was inadvertent, and will be corrected in this order.

In addition to respondents' petitions for reconsideration, Phillips also filed a request for stay of the suspension of its tariff rate. In this pleading it argues that a refund provision without suspension would avoid harm to it while adequately protecting shippers. Arguments of this nature were fully considered in the Commission's previous orders, and no reason for modification of those conclusions has been shown. The request for stay will be denied.

It is contended by the protestants in their petitions (1) that the Commission should extend the duration of its suspension period beyond the specified seven months to the full period of the investigation, or seek legislative authority to do so; (2) that the suspension periods should be calculated from the date of readiness to provide for-hire service, rather than from the effective dates of the tariffs; (3) that the authorized interim rates should be reduced on the basis of different conclusions regarding valuation, tax allowances, and depreciation charges; and (4) that refunds should be provided for at a 10 percent rate rather than at the lower rate resulting from the application of section 15(8) (e) of the Interstate Commerce Act.

We find no basis in protestants' petitions for modification of the conclusions in our orders. The seven-month duration of the suspension period is clearly specified in section 15(7) of the act, and is an expression of a carefully considered Congressional policy. Similarly, the date of commencement of the suspension period is clearly in-

licated in section 15(7) as being the proposed effective date of the tariff. The proper standards of cost and investment for the authorized interim rate were fully considered in our previous orders, and no reason for modification of those conclusions has been demonstrated. Finally, we do not agree that refunds should bear interest at a rate equal to the authorized rate of return of valuation, where there is no similarity in the risk characteristics of the respective uses of funds. Protestants' petitions, accordingly, will be denied.

Finally, in its "response" to petitions for reconsideration, Sohio makes the request, not previously made by any party in these proceedings, that interim rates for all of the carriers be authorized at the same level. Such a request for affirmative relief in a reply pleading is neither authorized by our General Rules of Practice nor fair to the other parties. Moreover, the requested action would result in different standards of profitability being applied to different carriers, without demonstrated necessity or justification. The request is without merit, and will be denied.

It is ordered, That our order of June 28, 1977, in Investigation and Suspension Docket No. 9164 is clarified and corrected by the insertion of the words "and including" after the words "suspended to" in the next-to-last line of the first ordering paragraph.

It is further ordered, That the petitions for reconsideration and other requests for affirmative relief contained in the pleadings described in the appendix to this order are denied.

Decided September 20, 1977.

By the Commission.

H. G. HOMME, JR.
Acting Secretary

(SEAL)

COMMISSIONER MURPHY, whom COMMISSIONERS STAFFORD AND MACFARLAND join, dissenting in part:

In light of circumstances presented on petition, including the reduction in the estimated volume of oil moving per day, I believe that respondents should be allowed an increase of 42 cents per barrel in the interim levels. The interests of parties in opposition are adequately protected by the refund provisions applying to the interim level of rates.

With respect to the request by some respondents that the suspension period be altered, it should be pointed out that the Commission can establish a shorter period where appropriate. As a matter of convenience, an identical expiration date of the suspension period, namely January 29, 1978, would be most appropriate, again giving due consideration to the fact that the parties in opposition are protected by other refund provisions.

I would deny the petitions in all other respects.

APPENDIX

Description of Petitions, Replies, and Other Pleadings
which are the Subject of the Present Order

Filed: PETITIONS

July 8 Petition of Exxon Pipeline Company for Reconsideration

July 22 Supplement to Petition of Exxon Pipeline Company for Reconsideration

July 25 Petition of the Bureau of Investigation and Enforcement for Reconsideration and Statutory Clarification of the Commission's Suspension Orders

July 25 Petition of ARCO Pipeline Company for Reconsideration

July 27 Petition of Union Alaska Pipeline Company for Administrative Review

July 27 Petition of Amerada Hess Pipeline Corporation for Reconsideration or Clarification

July 27 Petition of Mobil Alaska Pipeline Company for Reconsideration

July 28 Petition of Phillips Alaska Pipeline Corporation for Reconsideration and Revision

July 28 Petition of BP Pipelines Inc. for Reconsideration and for Permission to File a Revised Rate

July 28 Petition of the State of Alaska for Reconsideration

REPLIES

July 18 Reply of the Arctic Slope Regional Corporation to the Petition of Exxon Pipeline Company for Reconsideration and to Application for the Stay of the Order Served June 28, 1977

July 19 Reply of the United States Department of Justice to the Petition of Exxon Pipeline Company for Reconsideration

July 28 Reply of the Bureau of Investigation and Enforcement to Petitions for Reconsideration filed by Exxon Pipeline Company and ARCO Pipeline Company

August 15 Joint Response to Petition of the Bureau of Investigation and Enforcement to extend the TAPS Suspension Periods

August 15 Joint Response to Petition of the State of Alaska for Reconsideration

August 16 Response of Sohio Pipeline Company to Petitions for Reconsideration

August 17 Consolidated Reply of the United States Department of Justice to Petitions of the Respondents for Reconsideration of the Commission's Orders of June 28, 1977 and July 18, 1977

July 28 Request for Stay of Suspension Order Dated July 19, 1977 (filed by Phillips Alaska Pipeline Corporation)

August 10 Opposition of the Bureau of Investigation and Enforcement to Phillip's Request for Stay of the I&S Order

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CERTIFICATE OF SERVICE

I, Richard J. Flynn, counsel for petitioner Exxon Pipeline Company and a member of the bar of this Court, hereby certify that, pursuant to Rule 33, copies of Exxon Pipeline Company's Supplement to Petition for Writ of Certiorari have been served upon all parties to the proceeding below and upon the additional parties listed below via first class mail, postage prepaid by depositing the same in the United States Postal Service at Washington, D.C. this 27th day of September, 1977:

Wade H. McCree, Jr., Esquire
Solicitor General
Department of Justice
Washington, D.C. 20530

H. G. Homme, Jr.
Acting Secretary
Interstate Commerce Commission
Washington, D.C. 20423

Edward W. Wadsworth, Clerk
United States Court of Appeals
for the Fifth Circuit
600 Camp Street
New Orleans, Louisiana 70130

/s/ Richard J. Flynn
RICHARD J. FLYNN